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ELECTRONIC SURVEILLANCE FOR NATIONAL SECURITY PURPOSES

HEARINGS

BEFORE THE

SUBCOMMITTEES ON CRIMINAL LAWS AND PROCEDURES AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 2820, S. 3440, and S. 4062

OCTOBER 1, 2, AND 3, 1974

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I am confident that these issues, although complex, can be resolved quickly if the Congress and the Justice Department cooperate. These hearings can be the beginning of that effort so that substantive legislation can be acted upon early in the next session.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY ON WIRETAP LEGISLATION, SUBCOMMITTEE ON CRIMINAL LAWS, AND PROCEDURES AND SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, OCTOBER 1, 1974

Over the weekend, the Foreign Relations Committee released the testimony on Secretary Kissinger's role in the wiretapping of newsmen and government officials by the Nixon Administration. During those hearings, Alexander Haig was asked whether he approved the tapping of an acquaintance. In the course of his answer, General Haig said, "I quite frankly assumed I was being surveilled at that time." And Secretary Kissinger acknowledged that he inquired half-jokingly of former Assistant Attorney General Mardian, "Do you have what I said on the phone?"

There could be no better illustration of the fear and suspicion aroused in even our highest government officials by warrantless wiretapping conducted under the label of "national security." Testimony at earlier hearings revealed that President Nixon himself was overheard on a wiretap that he had authorized and that even a Congressman was subjected to wiretapping. It is little wonder that 75 per cent of those citizens responding to a recent survey felt that "wiretapping and spying under the excuse of national security is a serious threat to people's privacy."

Earlier this year, my Subcommittee on Administrative Practice and Procedure held six days of hearings on Warrantless Wiretapping and Electronic Surveillance. Those hearings demonstrated that too often the level of "national security" is used to justify wiretapping and surveillance carried out without regard to the legimate needs of our military security or national defense. The cases of 17 government officials and newmen, which we explored at the hearings are in point.

During the Nixon Administration, newmen and government officials were subjected to wiretapping on an unprecedented scale. This campaign to invade the most intimate personal lives of American citizens was personally authorized by the President. Each surveillance was carried out without a warrant. Each was undertaken under the guise of "National Security."

But many of the people tapped had only the most tenous connection with any matter related to the defense of our nation. Some had no access to national security information. Others were taped after they had left federal office and started working for political campaigns. Columnist Joseph Kraft had a wiretap placed in his home, and a "bug" placed in his hotel room abroad, at the instigation of the White House. Even the President's brother was taped by the Secret Service.

These taps were not only unjustified, but they were conducted under conditions of unparalleled secrecy. The records of the surveillance were not entered into regular FBI indexes. Summaries of the taps were regularly sent to the White House, and the records were secretly tranported there at the President's direction.

Testimony at our hearings revealed no precise guidelines within the Executive Branch governing national security electronic surveillances. The wiretap on Morton Halperin—one of our witnesses this week—was placed three days before the authorization for it was signed by the Attorney General.

Despite the large number of so-called national security wiretaps and the clear record of past abuses, there has been no comprehensive attempt to appraise the value of the information gained from these taps. Moreover, the Department of State, which could be expected to play a major role in foreign intelligence wiretapping appears to play only a minimal one.

As long as the Executive Branch alone asserts the power to decide who will be wiretapped, no American can be free of the fear of unrestrained government surveillance, and we will continue to spread the blanket of fear that has swept the country over the past several years. In order to remedy the abuses inherent in warrantless wiretaping a court order must be obtained before any wiretapping or bugging—even in the so-called "national security" area—can be permitted. Effective congressional oversight is likewise required to ensure that statutory and regulatory procedures are followed.

To accomplish these goals, I introduced yesterday the "Freedom from Surveillance Act of 1974." This bill would require a court order for all "national security" electronic surveillances, impose strict procedures for their approval and conduct, and provide criminal penalties for violation. My bill also provides for periodic reporting by the Attorney General to the Congress.

Under my bill:

A court order would be required for all national security wiretaps;

Such wiretaps would be narrowly restricted to foreign powers or their agents;

Wiretaps could not be authorized unless they were needed to obtain information necessary to protect against attack of a foreign power, to protect military security or national defense information against foreign intelligence or to obtain foreign intelligence information essential to our military security or national defense;

Such wiretaps could only be performed by the FBI;

The President could authorize a wiretap in case of a serious emergency threat to our military security or national defense, but would have to apply for a court order within 48 hours;

National security taps could not be used to gather evidence for a criminal prosecution; and

The Attorney General would have to report regularly to the Congress and would be directed to devise regulations to safeguard the right of privacy of persons overheard.

Electronic surveillance is a particularly offensive intrusion into our private lives. Wiretapping and bugging may make for suspense-filled motion pictures, but in real life they make for invasion of privacy of the most insidious sort. The subject of surveillance does not know that it is taking place. Neither do his family or associates, or even strangers, who may be overheard.

George Orwell may prove to have been 10 years ahead of his time if we cannot bring under control whom Big Brother is watching, and when.

Congress is currently considering a number of measures designed to afford protection of the privacy of American citizens. Increased legislative safeguards for electronic surveillance are but one more indispensable step in this process. I am glad that the Chairman has responded to the concern of the public and the Congress by scheduling these hearings. It is my hope that they will lead to speedy enactment of legislation early in the next Congress.

STATEMENT BY SENATOR EDMUND S. MUSKIE, D-ME.

As one of the original cosponsors of the Freedom From Surveillance Act of 1974 I am delighted to have this opportunity to submit testimony to these hearings on legislation regarding national security wiretapping.

Jointly with two Judiciary Subcommittees, the Foreign Relations Subcommittee on Surveillance, of which I am Chairman, held hearings this spring and summer to explore the balance between our legitimate national security needs and the rights of individuals in cases of wiretapping for national security purposes. As a result of our investigations, we found that there was a clear need to closely define and sharply limit the Executive authority to order wiretaps or other means of electronic surveillance—both because of past abuses and because of the potential for future abuse.

In our democracy, a decision to invade the privacy of an American citizen or of anyone living in America must be made with a full regard for the constitutional rights which could thus be jeopardized. Such a decision should not be made lightly or abritrarily by the Executive.

Three of the first four Constitutional Amendments in our Bill of Rights deal directly with our freedom to be safe in our homes, thoughts, and persons. They are freedoms from government intrusion into our lives.

Congress dealt with the problem of domestic surveillance in the Omnibus Crime Control and Safe Streets Act of 1968. But similar invasions of privacy with a national security justification were not covered. And it has become evident that the national securtiy argument can be and has been used as a cloak for actions ranging far afield of our legitimte national security interests.

As reasonable men, we had put our faith in the reasonable use of power. That faith has been abused, and we offer this legislation to check the unreasonable power now vested in the President to order actions in the name of national security.

City so affected our relations with the Soviet Union as to bring the matter within the purview of the President's authority over the conduct of foreign affairs. This, the court said, justified the FBI's electronic surveillance of Jewish Defense League activities.

But had the Nelson bill been in effect, the FBI would have been unable to collect intelligence information relevant to formulation of policies regarding the Soviet Union and the Middle East.

I would be naive in the extreme, Mr. Chairman, to assume that only a foreigner is an appropriate subject for an intelligence surveillance to obtain information pertinent to foreign policy or national security.

And please, if you would, carefully consider the bill's inordinately narrow and restrictive definition of "foreign agents."

One. A foreign agent must be an individual who is not a U.S. citizen or in the process of becoming one.

Two. The foreign agent's first allegiance must be to a foreign power.

Three. His activities must be intended to serve the interest of that foreign power.

Four. His activities must be for the purpose of undermining the security of the United States.

We interpret that last provision to mean that only those foreign agents whom we could show are actively undermining the security of the United States could be subjected to a foreign intelligence electronic surveillance.

Each and every element of the bill's definition of a foreign agent must be satisfied before an electronic surveillance warrant may be obtained under this provision.

This in itself could be a formidable piece of work. And it could very well prevent the FBI from obtaing critically needed intelligence information during a grave international crisis.

Consider, for example, a flareup between two small powers, neither interested in undermining the security of the United States, but each of which could inadvertently involve the superpowers in a major conflict.

The President might properly instruct that an electronic surveillance be conducted by the FBI to detect early warning signs of major power involvement in the crisis.

Under the Nelson bill, the FBI would be prohibited from obtaining the essential information if we were unable to show the court that the intended subject of the surveillance was, at that particular time, engaged in activities intended to undermine the security of the United States.

Let us examine another requirement of the bill. It provides that the FBI could not conduct a foreign intelligence surveillance unless a judge finds "probable cause" to believe the surveillance is necessary and will produce the desired results.

There is an express requirement that we furnish "evidence" independent of our conclusory opinion, or others' conclusory opinions, that the surveillance will serve purposes enumerated.

Conclusory opinion standing alone has never been adequate for an arrest or search warrant. While "evidence" is not defined in the bill, its presence in the bill's language suggests something more will be required than presently is required for warrants. But what?

Remember, we are talking about intelligence cases bearing on foreign policy and national defense.

And the bill demands that a judge must find probable cause to believe that the surveillance is necessary and will produce the desired results.

Should judges be burdened with the grave responsibility of deciding whether such surveillances are reasonable and necessary to fulfill information requirements of foreign policy and national defense?

Judges presumably are well qualified by training and experience to exercise final discretion in matters of law and questions of evidence. But can they be expected to be as well versed in matters of foreign policy and national defense?

Practical experience and common sense compel us to believe that the Nelson bill's warrant requirements for foreign intelligence electronic surveillances would be unworkable in practice.

For example, we would be unable to obtain a warrant to surveil a suspected foreign intelligence officer unless the Bureau could produce facts showing the surveillance will produce valuable national security information, which we must identify.

It would be a rare case indeed in which we could provide such evidence to the judge.

The FBI's experience with foreign intelligence cases, I can tell you, has clearly demonstrated to us the difficulty in predicting the potential benefits to be derived from a surveillance.

In investigating crimes such as bank robbery or extortion, logical avenues of inquiry are established by the elements of the crime. The evidence sought is clearly prescribed by these elements.

But there are no such guidelines in the field of foreign intelligence collection. No single act or event dictates with precision what thrust an investigation should take; nor does it provide a reliable scale by which we can measure the significance of an item of information.

The value and significance of information derived from a foreign intelligence electronic surveillance often is not known until it has been correlated with other items of information, items sometimes seemingly unrelated.

Also, difficulty in determining the potential value of information derivable from such an installation makes it hard to predict the required duration of the surveillance.

Which brings us to another point: the Nelson bill permits warrants for foreign intelligence surveillance installations for only 15 days with extensions of only 10 days.

In my opinion, these periods are prohibitively brief and are incompatible with foreign intelligence collection, which must continue as long as foreign intelligence activity poses a threat to the United States.

Furthermore, provisions of the bill would so increase manpower and budgetary requirements that they could conceivably discourage use of this technique even when such use would be prudent and reasonable.

One such provision is the requirement that the FBI furnish the issuing judge progress reports justifying continuance of the surveillance, apparently in addition to written justification for 10-day requests for extensions.

These progress reports and the 10-day extension periods obviously would impose severe constraints on our foreign intelligence collection